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be well reasoned and in agreement with the apparent trend in New York toward flexible application of the rules of evidence to meet the very practical problems encountered by both parties in a products liability suit.²⁴² As long as the habitual conduct evidence admitted involves a repeated particularized reaction by a person in control of a situation, it would seem that the considerations underlying the exclusion of general habit evidence will not be violated by continued application of the *Halloran* rule.

Evidence of subsequent repairs held admissible in products liability action.

New York courts consistently have ruled that proof of postoccurrence repairs is inadmissible to establish a defendant's negligence.²⁴³ The admission of such evidence is deemed contrary to public policy on the ground that it tends to discourage reparative measures.²⁴⁴ Recently, however, in *Barry v. Manglass*,²⁴⁵ the Appellate Division, Second Department, held that these policy considerations do not require that evidence of postaccident repairs be excluded in products liability actions.²⁴⁶

person's habit of smoking in bed probably is not sufficiently deliberate to be admissible. *McLaughlin, Evidence*, N.Y.L.J., Mar. 11, 1977, at 2, col. 2.

²⁴² The evidentiary problems encountered in products liability suits seem to encourage liberalization of the rules of evidence in such litigation. *See, e.g., Barry v. Manglass*, 55 App. Div. 2d 1, 10, 389 N.Y.S.2d 870, 877 (2d Dep't 1976) (auto recall letters held admissible in a products liability action); *Vincent v. Thompson*, 50 App. Div. 2d 211, 223-25, 377 N.Y.S.2d 118, 130-31 (2d Dep't 1975) (dicta) (the continued viability of the hearsay rule in products liability cases questioned).

²⁴³ *See, e.g., Getty v. Town of Hamlin*, 127 N.Y. 636, 638, 27 N.E. 399, 399-400 (1891) (evidence of postaccident repair inadmissible to prove a defendant's negligence); *Causa v. Kenny*, 156 App. Div. 134, 137-38, 141 N.Y.S. 98, 100 (1st Dep't 1913) (repairs in structure not admissible to establish negligence). *See also* W. RICHARDSON, *EVIDENCE* § 168 (10th ed. J. Prince 1973).

Although subsequent repair evidence is not admissible to establish negligence, it may be used for other relevant purposes such as establishing who controlled a particular instrumentality. *See id.*

²⁴⁴ *See Causa v. Kenny*, 156 App. Div. 134, 141 N.Y.S. 98 (1st Dep't 1913); *McCORMICK, EVIDENCE* § 275 at 666 (2d ed. 1972). Postoccurrence repair evidence has also been condemned as prejudicial. For example, in *Fraumberg v. Schmohl*, 190 N.Y.S. 710 (Sup. Ct. App. T. 1st Dep't 1921), plaintiff suffered injuries when she fell on a stairway in a house owned by a defendant. The trial court permitted testimony which established that subsequent to the accident, the owner of the building caused repairs to be made. In overturning this ruling, the appellate court stated: "[S]uch evidence has universally and most frequently been condemned as inadmissible and highly prejudicial." *Id.* at 711. (emphasis added).

²⁴⁵ 55 App. Div. 2d 1, 389 N.Y.S.2d 870 (2d Dep't 1976).

²⁴⁶ Strict products liability was recognized as a viable cause of action in New York in *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). There, the Court of Appeals held that "under a doctrine of strict products liability, the manufacturer of a

The plaintiffs in *Barry* were injured when an automobile in which they were riding was struck by a vehicle driven by defendant Manglass. Asserting a cause of action in negligence against Manglass and one in strict products liability against General Motors, manufacturer of the 1969 Chevrolet that Manglass was driving, plaintiffs filed suit in Supreme Court, Rockland County.²⁴⁷ The action against the manufacturer focused upon whether the collision was caused by a defect in the motor mount of Manglass' car. General Motors conceded that the left motor mount was separated from the automobile's framework after impact, but maintained that this was caused by the accident. Plaintiff's experts, on the other hand, contended that due to a defect the motor mount had separated prior to the impact.²⁴⁸

In attempting to bolster their experts' testimony at trial, plaintiffs sought to introduce portions of two recall letters which had been distributed by General Motors to owners of 1969 Chevrolets.²⁴⁹ These letters, sent at least 2 months after the *Barry* accident, advised owners of a potentially defective motor mount in models such as the Manglass vehicle. Despite General Motors' objections, the letters were admitted into evidence. A verdict was returned adjudging both defendants liable, and judgment was entered upon the verdict.

On appeal, Justice Shapiro, writing for the unanimous appellate division panel, held that "evidence of [General Motors'] post-injury remedial safety measures" had been properly admitted.²⁵⁰ In so ruling, the court found the policy arguments²⁵¹ which militate

defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about [the] injury." *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70. For a discussion of the *Codling* decision, see *The Survey*, 48 ST. JOHN'S L. REV. 611, 616 (1974).

²⁴⁷ Defendant Manglass had filed a cross-claim against General Motors. 55 App. Div. 2d at 3, 389 N.Y.S.2d at 872. Upon a finding by the jury that Manglass was negligent and that this negligence was a proximate cause of the accident, the trial court dismissed the cross-claim. The Appellate Division, Second Department reversed and ordered a new trial, finding that the lower court had improperly admitted evidence concerning defendant's intoxication on another occasion. *Id.* at 12-13, 389 N.Y.S.2d at 878.

²⁴⁸ *Id.* at 4, 389 N.Y.S.2d at 872-73.

²⁴⁹ The first recall letter contained the following warning: "[W]e are sending this letter to call to your attention a possible safety hazard which exists should separation of an engine mount occur on your vehicle." It further cautioned that "[a] sharp left turn during forward acceleration can increase the possibility of engine rotation if the left engine mount has separated." *Id.* at 4-5, 389 N.Y.S.2d at 873, (quoting Letter from General Motors to Chevrolet Owners (March 1972)).

²⁵⁰ 55 App. Div. 2d at 7, 389 N.Y.S.2d at 875.

²⁵¹ *Id.*, 389 N.Y.S.2d at 874.

against this type of evidence in negligence cases inapplicable to strict products liability actions.²⁵² Faced with potentially enormous liability if a defective product remains on the market, "it is manifestly unrealistic to suggest that (a manufacturer) will forego making improvements . . . and risk innumerable additional lawsuits . . . simply because evidence of adoption of such an improvement may be admitted in an action founded on strict liability" ²⁵³ Any prejudice which might result from the admission of the recall letters, Justice Shapiro reasoned, may be minimized by a charge to the jury stressing that the letters do not establish that the defect existed in the particular vehicle involved in the action.²⁵⁴ In any event, since the plaintiff in a products liability suit must establish "that the defect existed . . . at the time when the product left the hands of the manufacturer,"²⁵⁵ the court concluded, "the relevancy

²⁵² *Id.* at 6-9, 389 N.Y.S.2d at 874-76. Prior to discussing the policy considerations underlying the subsequent repairs doctrine, the court observed that "[l]iterally, of course, [the rule] does not apply [to this case] because the letters were not an aftermath of the accident." *Id.* at 6, 389 N.Y.S.2d at 874.

²⁵³ *Id.* at 8, 389 N.Y.S.2d at 875 (quoting *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 120, 528 P.2d 1148, 1153, 117 Cal. Rptr. 812, 816 (1974)). For an in-depth analysis of this area, see Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 848-49.

In response to General Motors' public policy argument that the admission of the letters "would discourage manufacturers from announcing a possible defect," 55 App. Div. 2d at 10, 389 N.Y.S.2d at 877, the court pointed out that such an action is mandated by federal law. *Id.* Under the National Traffic and Motor Safety Act of 1966, 15 U.S.C. §§ 1411-1420 (Supp. V 1975), a manufacturer finding a defect in one of its automobiles which may be present in other vehicles it manufactured has a duty to warn all who have purchased the product of the defect. *Id.* Failure to comply with the act may lead to the imposition of civil penalties. *Id.* § 1415(c)(1). In addition, as the *Barry* court noted, a manufacturer having knowledge that his product is inherently dangerous is under a common law duty to warn purchasers. 55 App. Div. 2d at 10, 389 N.Y.S.2d at 876. See *Rainbow v. Albert Elia Bldg. Co.*, 49 App. Div. 2d 250, 373 N.Y.S.2d 928 (4th Dep't 1975) (failure to warn may be sufficient basis for strict liability in tort action); *Comstock v. General Motors Corp.*, 358 Mich. 163, 176, 99 N.W.2d 627, 634 (1959) ("[t]he duty to warn of known danger inherent in a product . . . has long been a part of the manufacturer's liability doctrine"). Due to the enormity of a manufacturer's potential liability for failure to warn, it is unlikely that he would refuse to give notice out of fear that it might later be used as evidence against him. Note, *Products Liability and Evidence of Subsequent Repairs*, 1972 DUKE L.J. 837, 848-49.

²⁵⁴ 55 App. Div. 2d at 10, 389 N.Y.S.2d at 877. See *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976) wherein the court upheld the admission of a manufacturer's recall letter, but emphasized that the letter alone does not establish a prima facie case. The letter is some evidence, however, that a defect existed at the time the product left the manufacturer. *Id.* at 58.

²⁵⁵ 55 App. Div. 2d at 10, 389 N.Y.S.2d at 876. The doctrine of strict products liability differs from that of absolute liability. A plaintiff seeking to recover in strict liability must show that the product had a defect at the time of delivery which rendered it unreasonably dangerous to consumers and that this defect was the proximate cause of the injury. *Jerry v. Borden Co.*, 45 App. Div. 2d 344, 358 N.Y.S.2d 426 (2d Dep't 1974).

of the recall letters outweighs any possible prejudice" which might be occasioned by their receipt in evidence.²⁵⁶ Because the trial court had not attempted to dispell this prejudice via careful jury instructions, however, the cause was remanded for a retrial.²⁵⁷

It is submitted that the result reached in *Barry* is both desirable and just. The postoccurrence repair doctrine recently has been sharply attacked by a commentator who maintained that it deprives many deserving litigants of relevant and often crucial evidence.²⁵⁸ Courts of some jurisdictions, perhaps in recognition of this severe effect of the rule, have refused to apply it in products liability actions.²⁵⁹ Beyond its adverse impact on the truth-seeking process, the doctrine's principal justification may be unfounded; no empirical data exists to substantiate the claim that admission of subsequent repair evidence would discourage reparative measures.²⁶⁰ By refusing to extend the rule, the *Barry* court has ensured that a jury in a products liability action will not be unreasonably "deprived of a complete picture" of the case's factual setting.²⁶¹ Hopefully, *Barry* is the first step towards the elimination of the harsh subsequent repairs doctrine from New York's law of evidence.²⁶²

Sale of cooperative stock held subject to real property statute of frauds.

An individual purchasing shares of stock in a cooperative housing corporation receives a proprietary lease entitling him to occupy an apartment in a housing complex.²⁶³ The combination of stock and

²⁵⁶ 55 App. Div. 2d at 10, 389 N.Y.S.2d at 876. Additionally, the court, taking judicial notice of the millions of recall letters already issued by car manufacturers, reasoned that if the letters were not admitted, the jurors "might well . . . believe that no such letters were issued and that the claimed defect was a solitary one and did not in fact exist." *Id.* at 11, 389 N.Y.S.2d at 877.

²⁵⁷ The trial court's failure to properly charge the jury prompted the appellate division to order a new trial. The charge was prejudicial, the court held, because it was not made clear to the jurors that the letters were not admissions that the vehicle involved in the case was defective. *Id.*

²⁵⁸ See Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 THE FORUM 1 (1971) [hereinafter cited as Schwartz].

²⁵⁹ See, e.g., *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48 (Okla. 1976).

²⁶⁰ Schwartz, *supra* note 258, at 6.

²⁶¹ *Id.* at 7.

²⁶² Apparently, other New York courts have reached the same conclusion as the *Barry* court. See *Murphy v. General Motors Corp.*, 55 App. Div. 2d 486, 391 N.Y.S.2d 24 (3d Dep't 1977), wherein the appellate division observed, without comment, that the trial court had admitted a recall letter into evidence.

²⁶³ See 2 P. ROHAN & R. RESKIN, *COOPERATIVE HOUSING LAW AND PRACTICE* § 2.02(5)(e)

leasehold interests which the purchaser acquires creates difficulties for those attempting to define the nature of the interest possessed by the tenant-stockholder.²⁶⁴ Recently, in *Sebel v. Williams*,²⁶⁵ the Civil Court, Queens County, held that the sale of cooperative stock involves the transfer of an interest in real property and that the real property statute of frauds²⁶⁶ thus requires such a transaction to be in writing.²⁶⁷

In *Sebel*, defendants entered into an oral contract to purchase shares of stock in a housing cooperative and the accompanying proprietary lease which was allocated to that stock.²⁶⁸ Defendants failed to purchase the stock, however, and plaintiffs instituted an action for breach of contract.²⁶⁹ Contending that the cooperative stock and lease consistently have been held to be personal property,²⁷⁰ plaintiffs asserted that the sale did not represent the exchange of an interest in real estate. Arguing, therefore, that the statute of frauds was not applicable to the sale, plaintiffs maintained that the oral agreement was enforceable notwithstanding the absence of a written contract.²⁷¹

While agreeing with plaintiffs' argument that the stock and lease were personal property, the transfer of which did not constitute a sale of an interest in real estate, the *Sebel* court nevertheless

(1977). Normally, in lieu of a fixed rental, a monthly service charge covering the tenant's proportionate share of the expenses of the cooperative is assessed. The amount of the assessment is usually based upon the percentage of shares owned by the cooperator. See Isaacs, *History and Development of the Co-operative Apartment*, PRAC. LAW, Nov. 1959, 62, 66.

²⁶⁴ See Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personality?* 73 COLUM. L. REV. 250 (1973).

²⁶⁵ 88 Misc. 2d 411, 388 N.Y.S.2d 494 (N.Y.C. Civ. Ct. Queens County 1976).

²⁶⁶ N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 1964 & Supp. 1976-1977) provides: "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract . . . is in writing . . ."

²⁶⁷ 88 Misc. 2d at 414, 388 N.Y.S.2d at 496.

²⁶⁸ *Id.* at 411-12, 388 N.Y.S.2d at 494.

²⁶⁹ *Id.* at 412, 388 N.Y.S.2d at 494.

²⁷⁰ *Id.* at 413, 388 N.Y.S.2d at 495. In support of their contention that the sale of cooperative stock and the accompanying lease constituted the sale of personal property, plaintiffs cited *Silverman v. Alcoa Plaza Assocs.*, 37 App. Div. 2d 166, 323 N.Y.S.2d 39 (1st Dep't 1971), and *State Tax Comm'n v. Shor*, 84 Misc. 2d 161, 378 N.Y.S.2d 222 (Sup. Ct. N.Y. County 1975), *aff'd per curiam*, 53 App. Div. 2d 814, 385 N.Y.S.2d 290 (1st Dep't 1976). In *Silverman*, the appellate division determined that cooperative stock qualifies as a "good," the sale of which is governed by article 2 of the Uniform Commercial Code. 37 App. Div. 2d at 172, 323 N.Y.S.2d at 45. Subsequently, in *Shor*, the Supreme Court, New York County, in the course of determining lien priorities, concluded that cooperative stock is personal property. 84 Misc. 2d at 164, 378 N.Y.S.2d at 224.

²⁷¹ 88 Misc. 2d at 413, 388 N.Y.S.2d at 495.